IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-994

CLAUDE BISHOP MINTON,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to The
United States Court of Appeals for The
Fourth Circuit

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Petition for a Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

The petitioner, CLAUDE BISHOP MINTON, prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of that Court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (Petitioner's Appendix I) is not yet reported.

JURISDICTION

The Judgments of the Court of Appeals for the Fourth Circuit sought to be reviewed were entered by that Court on the 30th day of November, 1973. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. WERE OBSERVATIONS OF FEDERAL AGENTS, WHICH OBSERVATIONS WERE USED AS JUSTIFICATION FOR THE WARRANTLESS ARREST OF THE PETITIONER AND SEARCH OF HIS PREMISES, MADE FROM A CONSTITUTIONALLY-PROTECTED AREA?

2. WAS THE SEARCH OF THE PETITIONER'S PREMISES AND SEIZURE OF THE PETITIONER'S PERSON WITHOUT EITHER ARREST WARRANT OR SEARCH WARRANT LEGALLY ACCOMPLISHED AS BEING INCIDENT TO A LAWFUL ARREST?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Amendment Four to the Constitution of the United States.

B. 26 U.S.C. Sections 5173, 5601, 5222, 5205, and 5604.

STATEMENT OF THE CASE

The petitioner was convicted in the United States District Court for the Middle District of North Carolina at the April, 1973 term on a two-count Bill of Indictment charging the petitioner with transportation of an unlawful concealment of distilled spirits and possession of non-tax paid spirits. The petitioner filed a motion to supress the evidence on the ground that a search warrant should have been obtained by the officers of the Alcohol, Tobacco and Firearms Division prior to their

going upon the property of the petitioner, and that the agent did, in fact, invade a constitutionally-protected area in searching the property of the petitioner. This motion was denied by the District Court. The petitioner was found guilty by the Court sitting without a jury. Timely notice of appeal to the Fourth Circuit Court of Appeals was filed by the petitioner in apt time, and the petitioner was admitted to bail.

The facts and circumstances for the procurement of the evidence by the United States through its Alcohol, Tobacco and Firearms officers, and upon which the United States relies for the legality of the search and seizure are as follows:

> Based on a tip from a most reliable informant that a whiskey delivery would be made to the petitioner's premises between 6:00 and 7:00 P.M. on November 3, 1972, and further based on previous reliable information gained over a period of two years that petitioner was using his property to store illicit liquor but without a search warrant, ATF officers went to the Minton premises on November 3, 1972 and took up a place of observation some 80 to 90 feet from a building on Minton's premises. This point of observation was half way down a bank which formed an enclosure of the paved area surrounding the Minton premises (See Court's Exhibit A). There were two agents who had a communicating device with them. After observing the petitioner unload boxes containing plastic containers from a van truck to his building, the officers approached Minton and arrested him for the crimes as hereinbefore set forth.

FEDERAL JURISDICTION

This was a criminal proceeding instituted by the United States of America upon indictment charging the petitioner with violation of criminal statutes under the Internal Revenue Code of 1954. This was the basis for federal jurisdiction of this case.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in the case of the petitioner is in conflict with applicable decisions of the Supreme Court of the United States and specifically in conflict with the following decisions:

A. *McDonald v. United States,* 335 U.S. 451 (1948).

B. *Hester v. United States,* 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898.

C. *Katz v. United States,* 389 U.S 347, 88 S. Ct. 507, 19 L. Ed. 2d 576.

D. *Jones v. United States,* 357 U.S. 493 (1958).

E. *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, reh den 404 U.S. 874, 30 L. Ed. 2d 120, 92 S. Ct. 26 (1971).

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the several Courts of Appeal of the United States as follows:

A. *Wattenburg v. United States,* 9 Cir., 388 F. 2d 853 (1968).

B. *Texas v. Gonzales,* 5 Cir., 388 F. 2d 145 (1968).

The Court of Appeals, in this case, did not determine that the area from which the agents made their observation was within the curtilage. It says that the petitioner could have no reasonable expectation of privacy considering the time of day and all the surrounding circumstances. It would seem elementary that a person would most expect and demand privacy while on his own premises during the hours after sunset as was the case here. Furthermore, all the circumstances here would indicate that the petitioner did in fact expect privacy. What area other than a completely private area would be utilized for the unloading of illicit liquor? This was a surrounding or enclosed area as is obviously disclosed by Court's Exhibit A. Both this and circumstances indicate exactly the

opposite conclusion than that conclusion the Court of Appeals reached. Even if the Court takes the position that the area where the respondent was standing was, in fact, a barn or warehouse, the petitioner would contend that this is an area which he could have reasonably expected to maintain in privacy.

In *Katz v. United States*, supra, the Supreme Court held that what a person knowlingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. Also, in *Wattenburg v. United States*, supra, the Ninth Circuit Court of Appeals held that a search and seizure adjacent to a house are constitutionally forbidden if they constitute an intrusion upon what the resident seeks to preserve as private, even an area which, although adjacent to the house, is accessible to the public. The Fourth Amendment protects people, not places.

The Court of Appeals has stated that at the time of the officers' entrance and approach upon the premises of the petitioner, officers had probable cause to believe that a felony was being committed in their presence. In other words, probable cause was determined to be present by the officers, not a neutral and detached magistrate. Impartial judicial officers are invested by our Supreme Court with the authority to resolve conflicts between the right of privacy and the right of search, except under "exigent circumstances." So the question now arises as to what "exigent" condition existed to justify this search. The petitioner was unloading liquor from a movable van for storage in a building where the agents had information liquor had been stored for two years. This was the petitioner's premises, at night a place where he would in all probability remain. At any rate, there were two agents present who could have called for or gone for a search warrant at any time.

The Court of Appeals maintains that the search and seizure was made incident to a lawful arrest and that the search would, therefore, fall into the "plain view" category of permissible searches. Assuming arguendo that probable

cause did exist for the arrest of the petitioner, was the seized liquor admissible under the "plain view" theory? In *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the United States Supreme Court held that a search incident to a lawful arrest was unconstitutional when officers were found to have seized evidence which was in plain view. The discovery of this evidence was anticipated by the officers; that is to say, it was not an "inadvertent" discovery. The Court stated,

> "But where the discovery is anticipated, where the police know in advance the location of the e idence and intend to seize it, the situation is altogether different. The requirements of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as 'per se and reasonable' in the absence of 'exigent circumstances'."

The petitioner does not contend that every anticipated "plain view" search is rendered unconstitutional by this *Coolidge* case, but the petitioner does feel that the Supreme Court was seeking to halt searches and seizures based on an arrest which was nothing more than a shield for the lack of a search warrant. By resting on what the officer determines to be probable cause, at a time he can reasonably anticipate the evidence is in plain view, the officer takes away the decision of probable cause from the detached judicial officer and puts it in his own hands. In other words, he uses his arrest to avoid his responsibility of first obtaining a search warrant.

The circumstances surrounding the arrest of the petitioner as set forth in the opinion of the Court of Appeals would seem to indicate that the agents maneuvered themselves within "plain view" and then made the arrest. The agents certainly went to the petitioner's premises expecting to see the petitioner receive a load of illicit liquor. The agents had been receiving information for two years that the petitioner was selling liquor at this location and had had information as recently as earlier in the day of the arrest that a load of liquor would arrive on the night of the arrest. Since the officers knew what to expect, probable cause might have well existed prior to their arrival at the

petitioner's premises, but no search warrant was sought. Observations on the premises strengthened the probable cause but still no search warrant was sought. Instead, the agents waited until the petitioner was in an area where the contraband was in plain view and then substituted an arrest for their search warrant. It is emphasized that there were two agents present and that they had a communicating device with them.

Our Courts have very carefully protected our property from unreasonable search and seizure by requiring search warrants except under extreme circumstances. The petitioner would contend that the Supreme Court in *Coolidge v. New Hampshire*, supra, recognized that the requirement of a warrant should apply to seizures of the person also. That is to say, that the protection of the person should have the same priority as property. In *Coolidge*, the Court states, at page 477:

> ". . . . . it is assumed that the police must, in the absence of one of a number of defined exceptions based on 'exigent circumstances,' obtain an arrest warrant before entering a man's house to seize his person.
>
> "It is clear, then, that the notice that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that seizures inside a man's house, without warrant, are per se unreasonable and the absence of some one of a number of well-defined 'exigent circumstances'."

The petitioner contends that his arrest was unconstitutional in that the officers did not have a search warrant and that the officers did not have an arrest warrant and that there were no exigent circumstances as set forth hereinbefore justifying their failure to obtain a search warrant.

The petitioner most respectfully submits that this petition should be allowed and that the acts on the part of the ATF officers should be found to be held unlawful

and that the evidence obtained by the ATF officers should be suppressed.

Respectfully submitted.

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1598

United States of America,

Appellee,

versus

Claude Bishop Minton,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued October 1, 1973 Decided November 30, 1973).

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and CRAVEN, Circuit Judge.

William H. McElwee, III, (McElwee and Hall on brief) for Appellant; N. Carlton Tilley, Jr., Assistant United States Attorney, (William L. Osteen, United States Attorney, on brief) for Appellee.

PER CURIAM:

Convicted of possession, transportation, and removal of illicit liquor, Claude Bishop Minton has appealed, arguing that his motion to suppress evidence procured by an allegedly illegal search and seizure should have been granted. The search at issue here resulted from surveillance of Minton's premises[1] by officers of the Alcohol, Tobacco and Firearms Division who were notified by a reliable informant that a whiskey delivery would be made at the appellant's premises between 6 and 7 p.m. on November 3, 1972. Based on this tip and previous information over a period of two years that Minton was using his property to store illicit liquor, but without a search warrant, the officers stationed themselves at the top of a 12-14 foot high embankment looking down on Minton's building at a distance of 80 to 90 feet. They observed a van truck arrive at the building shortly after 6 p.m. and by the use of binoculars viewed cartons containing one-gallon plastic containers being unloaded from the vehicle. They also detected the odor of illicit whiskey. Appellant was arrested as he reached into the truck to unload another carton; boxes holding plastic containers of illicit liquor were plainly visible in the truck and through the open doorway of the building. It is not clear that the embankment from which the officers made their observations belonged to Minton, but even if it did, such a location at such a distance is probably not within the curtilage. *United States v. Campbell*, 395 F. 2d 848 (4th Cir. 1968); *Hester v. United States*, 265 U.S. 57 (1924), *Care v. United States*, 231 F. 2d 22 (10th Cir. 1956). Nor did the use of binoculars by the officers constitute an extension of their persons so as to put them within the curtilage. *United States v. Lee*, 274 U.S. 559 (1926). More important than the rubric of realty, *see Wattenburg v. United States*, 388

1. Minton's brief refers to the premises as his "home;" however, the brief further characterizes the structure in question as a "building" in which appellant lived "part of the time" while other parts "were utilized as storage areas (Appellant's Brief, p. 4). His brief also states that Court's Exhibit 1 portrays the area. We have examined it, and it looks to us more like a barn or warehouse than a home.

F. 2d 853 (9th Cir. 1968); *Texas v. Gonzales*, 388 F. 2d 145 (5th Cir. 1968), there was here,we think, no reasonable expectation of privacy–considering the time of day and all the surrounding circumstances. *Katz v. United States*, 389 U.S. 347 (1967). Whether or not it might have been wiser (and the better practice) to have procured a search warrant, *but cf. Aquilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), such a warrant was not necessary since no search occurred until the officers entered upon defendant's premises and approached the van he was in the process of unloading. At the time of their entrance and approach the officers had probable cause to believe a felony was being committed in their presence. The subsequent search and seizure were made incident to a lawful arrest. *United States v. Rabinowitz*, 339 U.S. 56 (1950); *Brinegar v. United States*, 338 U.S. 160 (1949); *United States v. Young*, 322 F. 2d 443 (4th Cir. 1963).

Affirmed.